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SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CELLENE PEREZ,

Plaintiff,

CASE NO. 13-CV-2886 BEN (BLM)

vs.

**ORDER REMANDING  
ACTION TO STATE COURT**

CARMAX AUTO SUPERSTORES  
CALIFORNIA, LLC and DOES 1  
through 75, Inclusive,

Defendants.

On December 10, 2013, the Court issued an Order to Show Cause why this action should not be remanded for lack of subject matter jurisdiction. (Docket No. 4.) For the reasons stated below, this action is **REMANDED** to the Superior Court of California, County of San Diego.

**BACKGROUND**

This action arises from Plaintiff Cellene Perez's purchase of an allegedly defective used 2007 Nissan Sentra from Defendant CarMax Auto Superstores California LLC. On October 31, 2013, Plaintiff filed suit in California state court. The Complaint alleges: (1) breach of express warranty under 15 U.S.C. § 2310(d) and California Civil Code § 1794; (2) breach of the implied warranty of merchantability under 15 U.S.C. § 2310(d) and California Civil Code § 1794; (3) violation of the Consumer Legal Remedies Act, California Civil Code §§ 1750 *et seq.*; (4) violation of

1 the Unfair Competition Law, Business & Professions Code §§ 17200 *et seq.*; and (5)  
 2 fraud and deceit. The Complaint seeks damages, rescission of the purchase contract  
 3 and restitution of all monies expended, incidental and consequential damages, punitive  
 4 damages, equitable and injunctive relief, prejudgment interest, and reasonable  
 5 attorneys' fees and costs.

6 On December 5, 2013, Defendant removed this action under both diversity  
 7 jurisdiction and federal question jurisdiction. On December 3, 2013, the Court issued  
 8 an Order to Show Cause why this action should not be remanded for lack of subject  
 9 matter jurisdiction. (Docket No. 4.) Both parties have filed responsive briefs. (Docket  
 10 Nos. 8, 9.)

## 11 DISCUSSION

12 Congress has authorized a defendant to remove a civil action from state court to  
 13 federal court. 28 U.S.C. § 1441. Because federal courts are courts of limited  
 14 jurisdiction, the removal statute is strictly construed against removal jurisdiction. *See*  
 15 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Gaus v. Miles,*  
 16 *Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). “The strong presumption against removal  
 17 jurisdiction means that the defendant always has the burden of establishing that  
 18 removal is proper.” *Gaus*, 980 F.2d at 566 (internal quotation marks omitted). The  
 19 district court must remand any action previously removed from a state court “if at any  
 20 time before final judgment it appears that the district court lacks subject matter  
 21 jurisdiction.” 28 U.S.C. § 1447(c).

22 Defendant removed this action on the basis of both diversity jurisdiction and  
 23 federal question jurisdiction. Each will be addressed in turn.

### 24 I. DIVERSITY JURISDICTION

25 “Jurisdiction founded on [diversity] requires that the parties be in complete  
 26 diversity and the amount in controversy exceed \$75,000.” *Matheson v. Progressive*  
 27 *Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003) (per curiam); *see also* 28  
 28 U.S.C. § 1332(a).

1       The Court will address only the amount in controversy requirement, as this issue  
 2 is dispositive. Diversity jurisdiction exists only “where the matter in controversy  
 3 exceeds the sum of \$75,000, exclusive of interests and costs.” 28 U.S.C. § 1332(a).  
 4 This amount is determined by the amount of damages or the value of the property that  
 5 is the subject of the action. *Hunt v. Wash. State Apple Advertising Comm'n*, 423 U.S.  
 6 333, 347-48 (1977).

7       When a state court complaint affirmatively alleges that the amount in  
 8 controversy is less than \$75,000, the party seeking removal must prove to a “legal  
 9 certainty” that the threshold is met. *Tele Munchen Fernseh GMBH & Co.*  
 10 *Produktionsgesellschaft v. Alliance Atlantis Int'l Distrib., LLC*, No. CV 13-5834, 2013  
 11 WL 6055328, at \*2 (C.D. Cal. Nov. 15, 2013) (citing *Guglielmino v. McKee Foods*  
 12 *Corp.*, 506 F.3d 696, 699 (9th Cir. 2007)). When it is unclear or ambiguous from the  
 13 face of the complaint whether the jurisdictional threshold is met, however, a  
 14 “preponderance of the evidence” standard applies. *Id.* Here, Plaintiff does not seek a  
 15 specific amount in damages. The Complaint is ambiguous as to the total amount in  
 16 controversy, meaning that the preponderance of evidence standard applies.

17       In regard to actual damages, the total amount of the sale was \$15,835.24.  
 18 (Compl., Exh. 1.) In addition, Defendant concedes that general and compensatory  
 19 damages amount only to the amount of the total sale. (Def. Response at 7.)  
 20 Accordingly, the Court finds that only \$15,835.24 in actual damages is at issue.

21       In regard to punitive damages, punitive damage awards ranging from one to four  
 22 times the amount of damages are most likely to comport with due process. *State Farm*  
 23 *Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Defendant argues that the  
 24 Court should use a multiple of two when determining punitive damages in this case,  
 25 which would amount to an award of \$31,670.48. Defendant, however, fails to offer any  
 26 support for using a multiple of two. The Court declines to find that under a  
 27 preponderance of evidence standard, punitive damages amount to \$31,670.48.

28       In regard to attorneys' fees, if the plaintiff may recover attorneys' fees by either

1 statute or contract, the fee claim is included in the determination of the amount in  
 2 controversy, regardless of whether the fee award is mandatory or discretionary. *Galt*  
 3 *G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998). Attorneys' fees  
 4 incurred after the date of removal are not included in the amount in controversy. *See*  
 5 *Stelzer v. CarMax Auto Superstores Cal., LLC*, No. 13-CV-1788, 2013 WL 6795615,  
 6 at \*6 (S.D. Cal. Dec. 20, 2013); *Wastier v. Schwan's Consumer Brands*, No. 07-CV-  
 7 1594, 2007 WL 4277552, at \*3 (S.D. Cal. Dec. 5, 2007).

8 If Plaintiff prevails, an award of attorneys' fees may be proper. CAL. CIV. CODE  
 9 §§ 1780(e); 1794(d). In determining the amount of an award of attorneys' fees, this  
 10 Court will consider only the attorneys' fees incurred up to the time the action was  
 11 removed. Mark E. Edwards, Defendant's expert, estimates that the "Case Intake and  
 12 Claim Generation Phase" of this action—which "includes an initial meeting with the  
 13 client, review of documents, and generation of a complaint and a CLRA/Song-Beverly  
 14 Act demand letter"—required four to seven hours of junior attorney work, resulting in  
 15 \$1,200 in attorneys' fees. (Edwards Decl. at 11.) This estimate, however, is likely  
 16 inflated, as the complaint Plaintiff filed appears to be a form complaint used for cases  
 17 of this kind. Like Judge Larry Burns in *Stelzer*, the undersigned finds it more likely  
 18 that it took the junior associate one to three hours to complete this phase of litigation,  
 19 which would generate approximately \$600 in attorneys' fees. *Stelzer*, Case No. 13-CV-  
 20 1788 LAB (JMA), Docket No. 18, at 10.

21 In regard to injunctive relief, Defendant estimates that it would cost CarMax  
 22 \$350,000 to comply with the requested injunction. Plaintiff does not address the cost  
 23 of the requested injunction. The Court finds that Defendant has greatly overestimated  
 24 the cost of complying with the requested injunction, and has failed to show that the  
 25 injunction is valued at more than a few thousand dollars. *Cf. id.* (finding that CarMax's  
 26 estimate of \$350,000 "borders on the preposterous").

27 Accordingly, Defendant has failed to show that under a preponderance of  
 28 evidence standard, the amount in controversy exceeds \$75,000. Strictly construing the

1 removal statute against finding jurisdiction, as *Kokkonen* requires, this Court finds that  
2 it lacks diversity jurisdiction.

3 **II. SUBJECT MATTER JURISDICTION**

4 Section 1331 provides, “The district courts shall have original jurisdiction of all  
5 civil actions arising under the Constitution, laws, or treaties of the United States.” 28  
6 U.S.C. § 1331. Defendant argues that this Court has federal question jurisdiction over  
7 the present action because Plaintiff asserts two claims under federal law—breach of  
8 express warranty and breach of implied warranty, under the Magnuson-Moss Act, 15  
9 U.S.C. § 2310(d).

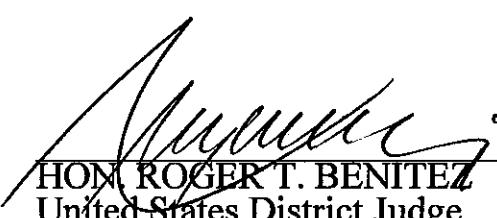
10 Under § 2310(d)(1)(B), “a consumer who is damaged by the failure of a supplier,  
11 warrantor, or service contractor to comply with any obligation under this chapter, or  
12 under a written warranty, implied warranty, or service contract, may bring suit for  
13 damages and other legal and equitable relief” in an appropriate district court. For such  
14 a claim to be cognizable, however, the amount in controversy must be at least \$50,000  
15 for all claims brought. 15 U.S.C. § 2310(d)(3)(B). Here, as explained above,  
16 Defendant has failed to show that the amount in controversy is at least \$50,000.  
17 Strictly construing the removal statute against finding jurisdiction, this Court finds that  
18 it lacks federal question jurisdiction.

19 **CONCLUSION**

20 For the reasons stated above, this action is **REMANDED** to the Superior Court  
21 of California, County of San Diego.

22 **IT IS SO ORDERED.**

23  
24 DATED: 1/28/14

  
25 HON. ROGER T. BENITEZ  
United States District Judge